

**Batesville Casket Company, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW.** Case 9-CA-26375

June 28, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 5, 1991, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Batesville Casket Company, Inc., Campbellsville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend our employees thereby discriminating in regard to their hire and tenure of employment in order to discourage membership in or activities on behalf of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

WE WILL offer to Douglas Bell, Jauhnell Cox, and Timothy Nicholas immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent employment and make them whole with interest for any loss of pay they may have suffered as a result of the discrimination practiced against them.

WE WILL remove from our files any reference to the suspensions of Douglas Bell, Jauhnell Cox, and Timothy Nicholas and notify them in writing that this has been done and that evidence of their unlawful suspensions will not be used as a basis for future personnel action against them.

BATESVILLE CASKET COMPANY, INC.

*Eric A. Taylor Esq.*, for the General Counsel.

*Kenneth J. Yerkes, Esq.*, of Indianapolis, Indiana, for the Respondent.

*David W. Hupp, Esq.*, of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, administrative law judge. On timely filed charges in the above-captioned case by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Union or Charging Party), a complaint issued on June 6, 1989, alleging that Batesville Casket Company, Inc. (Respondent or Employer) violated Section 8(a)(1) and (3) of the Act by suspending employees Douglas Bell, Jauhnell Cox, and Timothy Nicholas because they had participated in the protected concerted activity of striking against Respondent. An answer was timely filed by Respondent, and pursuant to notice a hearing was held before the Administrative Law Judge on August 22, 1989. Briefs have been timely filed by General Counsel, Respondent, and the Union, which have been considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is a corporation engaged in the manufacture and sale of burial caskets at its Campbellsville, Kentucky facility. During the past year Employer sold and shipped from its Campbellsville, Kentucky facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Kentucky. The complaint alleges, the Employer admits, and I find that the Employer is an employer engaged commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The employees of the Respondent have been represented by the Union since May 30, 1985, and have been covered under the terms of a collective-bargaining agreement from April 14, 1986, until it expired on February 26, 1989. Apparently unable to reach agreement on a contract, the employees struck on February 27, 1989.<sup>1</sup> A 24-hour-a-day picket line was established at the entrance to the plant.

About a month before the strike began, certain employees, including Sue Sadler, Brenda Perkins, and Bonnie Bryant, expressed a desire to continue working even if a strike occurred and asked Jim Flowers, production manager of the Company, if the Company would provide transportation for them since they were afraid to use their own vehicles to cross the picket line. Arrangements were made by Flowers to provide such transportation. On February 27, 1991,<sup>2</sup> the day that the strike began, arrangements were made to send a company van to the local National Guard Armory parking lot to bring nonstriking employees to work. After work they were returned to the same location. However, after the first day, the administrators of the armory expressed a desire not to become involved in the labor dispute and refused to let the Armory parking lot be used to pick up nonstrikers again. Flowers then contacted the local Best Western Motel and obtained permission to use its parking lot to pick up and return nonstrikers.

On the morning of the following day, February 28, the company van, driven by Flowers, went to the parking lot of the Best Western Motel to pick up nonstriking employees to transport them through the picket line into the plant to work. A security guard named Kavanaugh was in the passenger seat with a video camera/recorder. According to Flowers, there were some 6 or 7 cars and approximately 15 or 16 people in the parking lot. Flowers also testified that he saw striking employees Douglas Bell and Timothy Nicholas in their vehicles. Striker Terry Davis was a passenger in Bell's car and striker Jeff Baxter was a passenger in Nicholas' pickup truck. Bell admits that he was in the parking lot and that it was his intention to determine which employees were not striking, and to report that to the Union so as to be better able to gauge the effect of the strike on productivity. According to Flowers, these two vehicles made a partial circle of the parking lot, stopping while the van loaded some 10 nonstrikers for transport to the plant. While the van was loading, according to passengers Bryant and Sadler, some unidentified person in the group standing nearby shouted out that they would not make it to work that morning.

After the van was loaded it pulled out of the parking lot onto Route 55 (Broadway), the main route back to the plant. The Bell car had pulled out before the van and both were traveling in the same direction in the same lane, with the van behind Bell. Nicholas, in his pickup truck, was also traveling down Route 55 to the right of the van. Bell testified that he pulled out of the parking lot ahead of the van and so was unaware of when it left. He went down Route 55 at speeds of 30 to 35 miles per hour. He first noticed the van at a stoplight when the van pulled up directly behind him. Davis tes-

tified that after leaving the parking lot, he never saw the van again.

A video<sup>3</sup> showing parts of the van's return to the plant begins with the van starting at a substantial distance behind Bell's car and catching up to it only at a stoplight, at which time Bell changes into the right lane as the light is changing to red, going through the caution light while the van was stopping for the red light. It is undisputed that Bell was not seen again after that.

Meanwhile, as to Nicholas, it appears that Nicholas left the parking lot after the van and traveled along in the right lane to the right rear and then beside the van as it approached and stopped at the red light that Bell had just passed through. When the light turned green, Nicholas pulled quickly out ahead and over into the left lane in front of the van. There it remained for two traffic lights. There, as the video shows, Flowers moved away from behind Nicholas and pulled into the left turn lane where the light was still red. Nicholas passed through on the green light in the thru lane. Thereafter Flowers made the left turn, took the next right, and then another right returning to Route 55 and proceeding to the plant.

Nicholas admits that he purposely accelerated to get in front of the van at the traffic light because he wanted to get back to the plant ahead of the van, although he testified that there was no reason to do that and that he could have driven in the right lane and still gotten to the plant ahead of the van. Nicholas testified that he did not block or impede the progress of the van and that he was traveling at the same rate of speed both before and after he got in front of the van.

Flowers testified that when they pulled out of the parking lot, Bell was 20 or 30 feet in front of him and that thereafter he felt as if he were "boxed in" since Bell was in front of him and Nicholas to the side, and that he needed to take the "evasive" action described above, despite the fact that Bell had gone ahead and was not a factor at the time the evasive action was taken.

After evading Nicholas, Flowers returned to Route 55 on route to the plant. Flowers testified that further down Route 55 he noticed traffic backed up and slow. He saw a pickup truck driven by Juhnell Cox traveling only in the left lane in front of the van, and another car traveling slowly in the right lane. It is undisputed that there was another car between Cox and the van. Flowers slowed down to about 15 miles per hour as he approached the slower traffic. It also appears that at about this time, a black pickup truck had come up along the berm on the right, spun around, and was facing the oncoming traffic. Flowers testified that thereafter the traffic picked up and he was able to resume speed.

Cox testified that she and her passenger, Donna McCuffey, were traveling along Route 55 on route to the plant. There was traffic both in front and to her side. McCuffey called her attention to a black pickup truck that had come up on the berm to the right and spun out. Cox said that she slowed up a little and then went on. She first became aware of the Respondent's van when McCuffey called it to her attention just before the corner at a traffic light where they made a left turn up the hill into the plant. Cox made the left turn and proceeded to the plant where she parked her pickup truck.

<sup>1</sup> The parties stipulated that the strike was an economic strike.

<sup>2</sup> All dates refer to 1989 unless otherwise indicated.

<sup>3</sup> A video taken by Kavanaugh was introduced into evidence as J. Exh. 1.

along with the other strikers' vehicles on the right side of the road some distance from the plant entrance.

After the strike, the Company began to hire replacements and on Sunday, March 19, the Union on behalf of the striking employees made an unconditional offer to return to work and most employees returned to work on the following Monday or Tuesday.

Earlier, by letter dated March 7, signed by Gary Price, Respondent's vice president for human resources, Respondent notified Bell, Nicholas, and Cox that disciplinary action against them was being contemplated for picket line misconduct. By letter dated March 23, each received a letter signed by Jacky Arvin, plant manager, advising them that effective March 21 they had been suspended subject to termination for misconduct during the strike and that they would be given an opportunity to explain their actions before a final decision about termination was made. Thereafter each was interviewed by Respondent, shown a copy of the video, and the alleged misconduct was discussed. On May 16, by letter from Arvin, each was advised that they were not being terminated; that their suspensions were being lifted effective May 16, and that they were being placed on a recall list along with other permanently replaced employees. None had been recalled as of the date of the hearing.

#### B. Analysis and Conclusions

As a matter of law, economic strikers, unless they are replaced, are entitled to reinstatement on an unconditional offer to return to work made by them or on their behalf. If they have been replaced, they are entitled to reinstatement as positions become available. Striking employees who engage in strike misconduct, however, are subject to suspension or discharge and an employer may refuse to reinstate them. However, an employer who suspends, discharges, refuses to reinstate, or otherwise disciplines a striking employee must hold an honest belief that the striking employee has engaged in misconduct so serious as to deprive the employee of protection under the Act. Once that "honest belief" has been established, the General Counsel has the burden of going forward to prove that the strikers did not engage in such misconduct. *Clougherty Packing Co.*, 292 NLRB 1139 (1989).

The standard for determining whether picket line misconduct is so egregious as to suspend, discharge, or refuse to reinstate has been set out by the Board in *Clear Pine Mouldings*.<sup>4</sup> The Board established as a criteria that disqualifying conduct, to justify discharge, must be such that "under the circumstances existing, it may reasonably tend to coerce and intimidate employees in the exercise of rights protected under the Act." The Board also held, in a departure from precedent, that words alone could warrant a denial of reinstatement even in the absence of physical acts. The conduct of the alleged discriminatees must be examined according to the criteria established in the above cases.

First, Bell and Nicholas had a legitimate purpose in being at the Best Western parking lot. They had a legitimate reason to know how many nonstrikers were returning to work so as to gauge Respondent's capacity to produce and to evaluate the overall impact of the strike.

As to the remark in the parking lot that the nonstrikers would not make it to the plant, no one was able to identify

the speaker. Misconduct cannot therefore be assigned to any of the alleged discriminatees herein, nor can such remark constitute the basis for any good-faith belief that any specific individual had engaged in the misconduct. *Franzia Bros. Winery*, 290 NLRB 927 (1988).

As to the allegations of vehicular misconduct, Respondent contends that the van was "surrounded" by Bell and Nicholas. However, the probative evidence, particularly the video, discloses that Bell simply left the Best Western parking lot and was driving back to the plant. As the video discloses, there was a considerable distance between Bell and the van and it appears that Bell was traveling at a normal, constant rate of speed while the van was behind him. When they arrived at a light, Bell changed lanes and accelerated to go through it, leaving the van stopped at the light. Bell did not see the van after that. If Bell had wanted to remain in front of the van, it would have been more likely that he would have slowed at the light so as to ensure that result. Nothing in the manner in which Bell operated his vehicle showed that he was making any effort to impede the progress of the van. As to Nicholas, it appears that at the light, he went to a position in front of the van, but like Bell, did nothing to impede the progress of the van and in fact remained in front of the van for only a short distance to the traffic light when Flowers took the detour. After that, Nicholas did not see the van again. While Nicholas admits that he deliberately got ahead of the van so as to arrive at the plant before it, this does not establish that Nicholas' conduct was intimidating. Simply driving in front of a van for two blocks does not, without more, establish the type of coercion sufficient to disqualify Nicholas from further employment.

As to Cox, she was simply driving to the picket line at the plant in her pickup truck with McCuffey. She did not even see the van until she stopped for a traffic light just before taking a left turn from Broadway or Route 55 heading towards the plant.<sup>5</sup> There was another car between Cox and the company van at that time and thereafter. On making the turn, Cox simply proceeded, along with other traffic, at a rate of speed that the traffic allowed with vehicles to her front and side, and proceeded up the hill toward the plant where she parked along the side of the road. Nothing in the record or in the video tape even remotely suggests that Cox intimidated or even attempted to intimidate any nonstriking employee, nor did she in any way impede the progress of the van.

To the extent that traffic may have slowed down, there is no probative evidence in the record to suggest that Cox was responsible for the slowdown or that she otherwise took any action which could even remotely be construed as reasonably tending to coerce or intimidate employees in the exercise of their Section 7 rights.

In support of its position, Respondent cites several cases involving misconduct by striking employees in the use of automobiles, i.e., *Axelson, Inc.*, 285 NLRB 862 (1987); *Richmond Recording Corp.*, 280 NLRB 615 (1986), and *Auburn Foundry*, 274 NLRB 1817 (1985). While I agree that vehicles can and sometimes are used by strikers as an instrument of intimidation, the Respondent's problem is that the facts of the instant case are totally insufficient to support any such

<sup>4</sup> 268 NLRB 1044 (1984).

<sup>5</sup> Although Bryant testified to seeing Cox in the Best Western parking lot, a review of the relevant testimony convinces me that Bryant was mistaken.

conclusion. There is no probative evidence in this record showing that Bell, Nicholas, or Cox were operating their vehicles in any reckless, unsafe, or threatening manner so as to conclude that their actions reasonably tended to intimidate or coerce any nonstrikers. *MGM Grand Hotel*, 275 NLRB 1015 (1985).

In summary, I conclude that the actions of Bell, Nicholas, and Cox were essentially innocuous and nonthreatening and that Respondent has failed to establish any honest belief that they were engaged in misconduct so serious as to lose their protection under Section 7 of the Act. However, even assuming that such a good-faith belief has been established, the General Counsel has clearly met its burden of establishing that Bell, Nicholas, and Cox did not engage in any such misconduct.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent suspended Douglas Bell, Timothy Nicholas, and Jauhnell Cox for reasons which are found in the provisions of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that Respondent shall make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them. All backpay and reimbursement provided herein with interest shall be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By suspending Douglas Bell, Jauhnell Cox, and Timothy Nicholas, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

The Respondent, Batesville Casket Company, Inc., Campbellsville, Kentucky, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Suspending employees in order to discourage their membership in or activities on behalf of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Douglas Bell, Jauhnell Cox, and Timothy Nicholas immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the suspensions of Douglas Bell, Jauhnell Cox, and Timothy Nicholas and notify them in writing that this has been done and that evidence of these unlawful suspensions will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Campbellsville, Kentucky facility copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>6</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>7</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."